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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

I.

INTRODUCTION

Appellants have been denied their right to unemployment compensation, without a fair hearing at any time, solely on the basis of their former employers' *ex parte* reasons for termination. By the instant case, the appellants seek only to have the most frequently disputed issue in unemployment compensation (the reasons for termination of employment) impartially determined, and

hence to have their eligibility for compensation impartially determined, in a fair hearing provided either by the federal appellees or by the state appellees.

In their Brief, the federal appellees[1] erroneously characterize the purposes of and circumstances relevant to this action. Once these mischaracterizations are dispelled, the insubstantiality of the appellees' arguments becomes apparent.[2]

A. Appellants Seek Only Unemployment Compensation, Not Reemployment

The appellees allege that the "Appellants' real contention is not that the federal agencies incorrectly stated the reasons which led the agencies to discharge appellants, but that such discharges were improper" [Br. 10], and that the appellants "have no right to

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[1] The state appellees do not take issue with the appellants' claims; they contend only that they are bound by the federal appellees' interpretation of 5 U.S.C. §8506(a), and hence they defer to the federal appellees. Accordingly, this Reply Brief for Appellants is directed at the arguments advanced by the federal appellees. For convenience, the federal appellees will hereafter be referred to as the "appellees." References to the Brief for the Federal Appellees will be cited as "Br.___."

[2] Not included in this discussion is the correction of two factual errors made in the appellees' Brief. The first error is the appellees' statement that both appellants, on the basis of the *ex parte* reasons submitted by the federal appellees, were disqualified from receiving unemployment compensation on grounds of their "misconduct." [Br. 5-6, 19, 23]. The record, however, shows that only appellant Green was disqualified for misconduct. [A. 31]. Appellant Christian, on the other hand, was disqualified for voluntarily leaving her employment without good cause by reason of provoked discharge. [A. 15-16, 19-28, 44-51]. The second error is discussed in note 10, and accompanying text, pp. 10-11, *infra*.

challenge the validity of their discharge and therefore should not be permitted to contest it, either directly or collaterally." [Br. 28].

The appellants, however, never have contended that their discharges were improper nor have they sought to contest the validity of their discharges. [A. 12-14, 40-41]. As stated by Judge Frankel in his Dissenting Opinion below, "nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation." [A. 76, n.7] [emphasis in original]. The appellees subsequently contradict themselves by conceding that, "Appellants do not challenge . . . the propriety of summary discharges of federal probationary employees." [Br. 27]. Indeed, all the appellants seek is the right to a fair hearing for purposes of unemployment compensation—not for employment or reemployment.

B. A Fair Hearing for Unemployment Compensation Would Not Affect Federal Discharge Procedures

In their argument against the requirement for a fair hearing for making impartial findings, the appellees state that "[t]hose findings would result in appellants being entitled to unemployment benefits under state law. But such findings also would show that appellants' probationary employment had been improperly terminated. It would be difficult or impossible for the federal agency thereafter to refuse to restore appellants to the employment from which, it had held, they had been improperly discharged." [Br. 11]. In the same vein, the appellees contend that an unemployment compensation

fair hearing "would interfere with the government's traditional right of summary discharge." [Br. 28].

The fallacy of the appellees' contention is that the federal civil service system does not recognize the concept of improper termination of probationary employees.[3] As conceded by the appellees, probationary employees are "particularly susceptible to discharge" because they may be "discharged without cause." [Br. 13, 14]. See 5 U.S.C. §7501, 5 C.F.R. §315.804. Since probationary employees may be properly discharged without cause, an unemployment compensation hearing which merely reviews the facts surrounding a discharge without cause cannot affect the discharge nor can it cause reemployment.

C. A Fair Hearing Is Necessary To Determine the Most Frequently Disputed Issue in Unemployment Compensation

Although the appellees concede that the "reasons for termination are purely factual" [Br. 3], they incongruously contend that "[t]he determination of the reason for the discharge of a probationary employee involves no factual issue requiring a hearing. The federal agency knows the reasons for its action, and in order to state them it need only consult its own records." [Br. 10]. By this contention, the appellees provide support for the appellants' argument that such hasty, *ex parte* actions are precisely the type of actions which unemployment compensation hearings prevent. Moreover, the appellees conveniently overlook the fact that

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[3] The only exception to this is where a probationary employee has been discharged by reason of illegal discrimination or improper procedure. 5 C.F.R. §315.806.

the reasons for termination of employment constitute the "most frequently disputed" factual issue in unemployment compensation. *California Department of Human Resources v. Java*, 402 U.S. 121, 126 (1971).[4] Indeed, the appellees' contention that there is no factual issue requiring an unemployment compensation hearing is plainly rebutted by the state appellees' *finding* that Ms. Christian's separation was not the result of unsatisfactory conduct—a factual finding contrary to the *ex parte* reasons submitted to the state appellees by the federal appellees. [A. 21-22, 45].

D. The Required Fair Hearings May Be Provided Either by the Federal Appellees or by the State Appellees

The appellees repeatedly characterize the appellants' argument as one requiring the federal appellees to provide a fair hearing. The appellants, however, do not contend that the hearing required for purposes of unemployment compensation must be provided by the federal appellees. Rather, the appellants contend, as a unanimous panel of the Court of Appeals for the District of Columbia in

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[4] In New York, as in California, the reasons for termination of employment constitute the most frequently disputed issue in unemployment compensation. For example, in March, 1972, there were 4010 appeals taken to hearing referees from initial determinations of ineligibility or eligibility for compensation. Of these appeals, 2506, or 62.4% concerned reasons for termination of employment (misconduct in employment or voluntarily leaving without good cause). New York State Department of Labor, *Operations*, Vol. 34, No. 3, Table 17-A (March 1972). Similarly, in May, 1972, there were 3467 appeals to hearing referees. Of these appeals, 2471, or 62.2% involved reasons for termination of employment. New York State Department of Labor, *Operations*, Vol 34, No. 5, Table 17-A (May 1972).

Smith v. District Unemployment Compensation Board, 435 F.2d 433 (D.C. Cir. 1970) held, only that a hearing for purposes of unemployment compensation must be provided. Particularly instructive here is the remedy ordered by the Court of Appeals in *Smith* requiring that a hearing be provided either by the federal agencies *or* by the unemployment compensation agency. 435 F.2d 433, 439. Since the federal agencies in *Smith* subsequently declined to provide the fair hearing, the District Court ordered the unemployment compensation agency to provide Ms. Smith that hearing which it was already required to provide pursuant to 42 U.S.C. §503(a). [Brief App. 1c-2c]. This remedy, of course, does not interfere in any way with the administration of federal employment and yet it adequately protects an unemployed worker's right to have a fair determination of his eligibility for unemployment compensation.

II.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS VIOLATES THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. Appellants Do Not Allege an Interest in Continued Employment

In support of their contention that the appellants lack an interest sufficient to invoke due process protection, the appellees' erroneously characterize the appellants' due process interest as one of continued employment rather than one of entitlement to unemployment compensation. [Br. 18-19]. As previously noted, pp. 2-3, *supra*, this mischaracterization is directly contrary to the facts of the instant case. Since the appellants' interest in *unemployment compensation* is plainly sufficient to

invoke the protections of due process [see Brief for Appellants, 20-22], the appellees' argument simply is not addressed to the due process issue in this case.

B. Appellants' Property Interest of Entitlement to Unemployment Compensation Is Not Affected by the Procedures at Issue in This Case

Appellee's next argument is based upon reasoning similar to that which was recently rejected by this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Quoting from *Perry*, however, they argue that the scope of a property interest within the meaning of the due process clause may depend upon the "rules or understandings" which create the interest, 408 U.S. at 602, and therefore that the procedural deficiency of the law which created the interest is part of the substantive definition of the interest itself. [Br. 19-20]. In short, appellees argue that where the law fails to provide for due process, it necessarily creates a property interest to which due process does not apply.[5] The obvious error in the

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[5] In support of this argument, the appellees rely heavily upon *Dismuke v. United States*, 297 U.S. 167 (1936). Their reliance is wholly misplaced, however, since *Dismuke* was not a due process case, but rather it was a case of statutory interpretation in which this Court allowed judicial review of administrative determinations. Additionally, in reaching its decision, the Court did note the general requirement of [due process] fundamental fairness in administrative determinations:

> "If [the administrative officer] is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricous or unsupported by evidence; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized.

appellees' reasoning is that the very nature of procedural due process is to protect against the procedural deprivation of substantive property interests. Indeed, the appellees' circular argument is directly contrary to the numerous due process decisions of this Court which have corrected the due process procedural deficiencies of the very laws which created the property interests. See, *e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

C. The Federal Appellees' *Ex Parte* Procedures Do Not Satisfy Due Process

The appellees' finally contend that their *ex parte* procedures meet the requirements of due process [Br. 21-22]. Just as this argument is made without supporting authority, there is no supporting authority. It is beyond doubt that due process at the very least requires a "fair hearing on the fundamental facts." *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 199 (1933). As matters now stand, however, not only is there no hearing, but there is no opportunity for confrontation or cross-examination, no requirement that a decision be based upon the evidence, and no requirement for an impartial decision-maker. Compare the due process requirements set forth in *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (1970).

In fact, there are no requirements of any kind concerning the procedures used by the appellees for ascertaining the reasons for separation which are sub-

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But the power of an administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled." 297 U.S. at 172 (citations omitted).

sequently submitted to state unemployment compensation agencies. All that is clear from the federal determinations is that they are *ex parte* determinations. As stated by the appellees:

> "[U]nlike an independent fact-finding tribunal such as a state unemployment compensation agency, the federal employing agency is reporting facts of which it has direct knowledge."
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> * * * * *
>
> "The federal agency knows the reasons for its action, and in order to state them it need only to consult its own records." [Br. 10].

Interestingly, the *ex parte* procedure urged by the appellees is nearly identical to that procedure held to be constitutionally insufficient in *Goldberg v. Kelly*, 397 U.S. 254, 258 (1970). Unquestionably it is a denial of due process to engage in such a "secret, one-sided determination of facts" decisive of rights, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Frankfurter, J.). An agency's consultation with its records can be nothing more.[6]

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[6] The appellees also contend that the appellants cannot complain about the constitutional inadequacy of the federal appellees' *ex parte* procedure since they did not utilize the *ex parte* corrective procedure. [Br. 23]. Such an allegation is wholly without merit where, as here, the adequacy of the administrative procedure is the very issue to be resolved. *Gibson v. Berryhill*, 411 U.S. 564, 574, 575 (1973).

III.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS DENIES THEM EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. There are No Differences, Relevant to Unemployment Compensation, Between Non-Federal Employees and Federal Employees To Support the Appellees' Denial of an Unemployment Compensation Hearing to the Appellants

Reaching for a rationale for their distinction between non-federal employees and the appellants, for purposes of unemployment compensation, the appellees first contend that the Social Security Act coverage of private and state employees is so different from its coverage of federal employees that no federal employees are entitled to any unemployment compensation hearing whatsoever. [Br. 24-25]. While it is undisputed that federal employees were not covered by unemployment compensation until 1954,[7] it is equally obvious, as a result of the 1954 amendments, that unemployment compensation for all covered employees (whether private, state or federal) is identical in all respects but one. For all covered employees in the United States, unemployment compensation is administered by the states;[8] the state administrative costs are paid by the federal government;[9] and the

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[7] 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).

[8] 42 U.S.C. §§501-503, 26 U.S.C. §3304; 5 U.S.C. §§8502, 8505(h).

[9] 42 U.S.C. §§502-503, 1101(c), 26 U.S.C. §3304, 5 U.S.C. §8505.

compensation earned by unemployed workers is paid by their former employers.[10] The only difference between the unemployment coverage of non-federal employees and of federal employees is that the appellees deny unemployment compensation fair hearings to certain former federal employees.[11]

Despite this otherwise identical treatment of non-federal employees and federal employees, the appellees contend that a federal agency, unlike all other employers, need not submit its reasons for termination to "an independent fact-finding tribunal" since the federal agency "is reporting facts known to its officials or with which they have at least some acquaintance." [Br. 24, 25]. This contention, however, provides no grounds for distinction between a federal employer and any other employer. Indeed, the appellees' contention would best apply, if at all, to the smallest private employers who are most intimately familiar with their reasons for dismissal. In any event, the appellees' contention does not justify

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[10]26 U.S.C. §§3301-3309; 5 U.S.C. §8505. The appellees' statement that for non-federal employees "the compensation payments themselves are funded by the states" [Br. 24], is in error. *Id.*

[11]The discriminatory impact of the appellees' denial of unemployment compensation hearings to probationary employees, and of the appellees' requirement that the federal reasons for termination be treated as final and conclusive, is reflected by the extraordinarily high percentage of UCFE claims which are denied for other than monetary (employee earnings) reasons. In the year 1971, 64.7% of all UCFE claims in New York State were so denied. [A. 48]. In comparison, only 13% of all non-federal claims for unemployment compensation in New York State were so denied during that same year. New York State Department of Labor, *Operations*, Vol. 33, No. 12, Table 13-B (December 1971). The cause of this disparity is self-evident.

their distinction since they extend fair hearings to permanent federal employees,[12] and to federal employees who resign.[13]

B. There Are No Differences, Relevant to Unemployment Compensation, Between Permanent Employees and Probationary Employees To Support the Appellees' Denial of an Unemployment Compensation Hearing to the Appellants

To create grounds for their distinction between permanent employees and probationary employees, for purposes of unemployment compensation, the appellees first contend that the termination hearings provided to permanent employees have "little dircet relationship" to eligibility for unemployment compensation. [Br. 26]. While this initially may have been true,[14] current practice is to the contrary. The appellees' internal procedures specifically prohibit state unemployment compensation agencies from denying compensation to permanent federal employees whose federal hearings are pending; they also require the transmission of the findings (made after the federal hearings) to the state agencies. United States Department of Labor, Employment Security Manual §6663C.

The appellees next contend that their distinction between permanent employees and probationary employees for purposes of unemployment compensation is grounded in the historic tenure distinctions between the two groups. [Br. 27-28]. While the appellants concede these tenure distinctions for purposes of employment, it

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[12] 5 C.F.R. §§752.201 *et seq.*, 771.101 *et seq.*, 772.301 *et seq.*

[13] 20 C.F.R. §609.18(a).

[14] See pp. 16-17 *infra*.

is apparent that the appellees' proferred rationale does not have a "fair and substantial relation to the object of the[unemployment compensation] legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971) [quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)]. In fact, it is contrary to those objectives,[15] for, as conceded by the appellees, "Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of unemployment protection." [Br. 13]. The appellees, however, have provided that unemployment protection only to permanent employees, not to probationary employees.

C. The Considerations Which Necessitate the Provision of an Unemployment Compensation Hearing to Federal Employees Who Resign Also Necessitate an Unemployment Compensation Hearing for Federal Employees Whose Employment Was Otherwise Terminated

Although the appellees concede that the provision of federal or state unemployment compensation hearings to federal employees who resign (including probationary employees) was compelled by *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), they now contend that such a hearing is "necessary to provide the agency with sufficient information to make findings." [Br. 28]. The right to an unemployment compensation hearing, however, is not for the benefit of the employer, but "for all individuals whose claims for unemployment compensation are

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[15] See Brief for Appellants, 33-40, 42-51.

denied." 42 U.S.C. §503(a)(3). Yet the appellees' allegation does constitute an interesting concession: if an employer, instead of accepting an unemployed worker's reasons for resignation, needs a hearing to make a *finding* as to those reasons, so too does the unemployed worker need a fair hearing in order to have the reasons for termination fairly determined.

The appellees' failure to provide an adequate *ex post facto* rationale here is not altogether unexpected, however, in view of their failure to comply with the Court of Appeals' holding in *Smith*: "*No finding* by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 438 (D.C. Cir. 1970) (emphasis added).

IV.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS VIOLATES 42 U.S.C. §503(a) AND 5 U.S.C. §§8501-8508

A. Congress Required the Provision of Unemployment Compensation Hearings to All Covered Employees

The appellees do not contend that 5 U.S.C. §8506(a) requires the denial of an unemployment compensation hearing to the appellants; rather, they merely contend "that the Secretary [of Labor] has been granted authority to select the factfinding process–either including or excluding an adversary hearing– which in his view would best accord with the interests of claimants in expeditious but fair processing." [Br. 13]. Rather

inconsistently, they also argue that "[t]here is nothing in the legislative history . . . even suggesting the intention to require a hearing." [Br. 15].

The appellees, however, have conveniently overlooked the fact that "[w]e are after all dealing with a subject, unemployment compensation, in which the opportunity for hearing was considered by Congress to be so fundamental that it was expressly mandated on the State agencies that they provide 'opportunity for a fair hearing, before an impartial tribunal' for all individuals whose claims are denied."[16] When unemployment compensation was extended to federal employees,[17] "Congress assured a fair hearing to Federal employees governed by §8502 (for their claims are considered by the State agency which is under a general mandate to provide fair hearings for private employees), and to Federal employees governed by §8503 . . . . These provisions must be taken into account in considering the intention of that language of §8506 which states that the *findings* of Federal agencies shall be final and conclusive."[18]

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[16] *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 437-438 (D.C. Cir. 1970) (citation omitted).

[17] It must be remembered that Congress extended compensation to federal employees in order to end "the discrimination that has been practiced by the Federal government against its Federal civilian employees" and to "assure all of our citizens that they will be *equally* covered should they be so unfortunate as to become unemployed." 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer). As conceded by the appellees: "In considering the Act, Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of enemployment protection." [Br. 13].

[18] *Smith v. District Unemployment Compensation Board*, 435 F.2d at 438. (Emphasis added.)

Also contradictory to the appellees' argument is Congress' use of the term *findings*—for "Congress had generally in mind that there are extensive provisions for hearing before the Civil Service Commission in the case of Federal employees who are discharged."[19] Indeed, "[t]he great majority of federal employees are, of course, those in the permanent category. The prototypical civil servant, the one we are likely to envision when thinking in the global concepts of legislators, is in this group. Given that reality, and given the familiar procedures governing the separation of permanent civil servants, it is reasonable to infer that the 'findings' declared 'final and conclusive' were conceived as those affecting, and resulting from procedures affecting, permanent civil servants."[20]

B. The Federal Appellees Have Failed To Provide a Fact-Finding Process for Purposes of Unemployment Compensation

As noted, the appellees argue "that the Secretary has been granted authority to select the fact-finding process—either including or excluding an adversary hearing—which in his view would best accord with the interests of claimants in expeditious but fair processing." [Br. 13]. Although the appellees apparently rely upon that part of 5 U.S.C. §8506(a) which states that the "employing agency shall make findings in the form and manner proscribed by regulations of the Secretary,"[21] it

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[19] *Id.*

[20] Dissenting Opinion of Judge Frankel [A. 74].

[21] General rule-making authority was delegated to the Secretary pursuant to 5 U.S.C. §8508.

is difficult to understand the thrust of the appellees' argument. Even assuming, *arguendo*, the specific delegation of such unlimited discretion, the Secretary has altogether failed to prescribe any fact-finding process for the purposes of unemployment compensation. Examination of the regulations promulgated by the Secretary reveals only a description of the *forms* to be used by the employing agencies to transmit their reasons, not the *form* and *manner* in which findings are to be made. See 20 C.F.R. §609.6.[22] Candidly, the appellees concede this failure by stating that the Secretary's purported fact-finding process constitutes no more than "merely a statement of the agency's reasons for discharging the employee" [Br. 17], and that "[t]he federal agency knows the reasons for its action, and in order to state them it need only consult its own records." [Br. 10].

The appellees apparently seek to justify their failure to prescribe the form and manner of making unemployment compensation findings by relying upon a statement made by a witness before the House Committee on Ways and Means. The appellees urge that "it was understood that administration of the [1954] Act would not significantly

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[22] The Secretary's failure to prescribe a fact-finding process is not mitigated by his regulations providing for correction by the employing agency of errors and omissions. Like the earlier regulations, the corrective regulations do not prescribe any fact-finding procedure for making corrections. See 20 C.F.R. §§609.23, 609.7 and 609.9. In any event, the corrective regulations are required by statute in addition to regulations prescribing the form and manner of making the initial findings:

> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions." 5 U.S.C. §8506(a).

affect 'existing operating methods and procedures.' " [Br. 15]. Actually, the witness, quoting another source, stated that "the program will not . . . call for a complete overhauling of existing operating methods and procedures,"[23] thus at least implying a need for some new operating methods and proceudres. Even this suggestion, however, has been rejected by the appellees since they have failed to change *any* operating methods or procedures for purposes of unemployment compensation, other than those relating to employees who resign.

C. Where the Federal Appellees Fail To Provide Unemployment Compensation Hearings, the Federal Reasons for Termination Are Subject to Review by the States

If anything is undisputed in this case, it is the fact that the federal appellees object to their provision of unemployment compensation hearings to the appellants. Also undisputed, however, is the fact that the state appellees, acting as agents of the federal appellees in New York, 5 U.S.C. §8502(a), are required by 42 U.S.C. §503(a)(3) to provide "a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied," including individuals such as appellants Christian and Green. Aware that compliance with this statutory requirement provides a simple solution to the issue here, the appellees argue only that it would be "inappropriate" for the state, in determining eligibility for unemployment compensation,

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[23] Hearings on H.R. 6537, 6539, 7074, 8857 and 8585 before the House Committee on Ways and Means, 83rd Cong., 2nd Sess. 55.

to review in its fair hearing the "statement of the agency's reasons for discharging the employee."[24] [Br. 17]. In support of this contention, the appellees rely upon one witness' written testimony, submitted to the House Committee on Ways and Means, stating that federal "findings involve questions of federal employment and wages which require uniform application at the Federal level."[25] Although determinations as to length of employment and wages earned may be the subject of some uniformity, similar uniformity for determining the reasons for discharge is altogether unattainable in a system which allows a multitude of middle-level supervisors in a multitude of federal agencies and departments to fire probationary personnel, *ex parte* and without cause. Further curtailing any expression of uniformity is the disparate application of different state unemployment laws by the fifty states and the District of Columbia. Finally, of course, the appellees' claim for uniformity is particularly incongruous since they have rejected it themselves in favor of providing fair hearings to all but one limited group of former federal employees. Thus, rather than providing uniformity, the appellees have provided license to federal supervisors everywhere to deny unemployment compensation to their probationary employees—those whom the appellees anomalously concede to be "particularly susceptible to discharge and therefore peculiarly in need of unemployment protection." [Br. 13].

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[24] Contrary to the appellees' contention, one of the fundamental objectives of the unemployment compensation hearing is to provide an impartial examination of an employer's reasons for discharge. This statutory objective remains constant whether the employer is federal, state or private.

[25] Hearings, *supra* at 16.

If the federal appellees deem it *inappropriate* for the state to review the federal reasons for termination, then the federal appellees must provide an unemployment compensation fair hearing in the first instance. But, "if no such Federal hearing is provided, the Federal finding contradicting the [appellants'] reasons for [termination] shall be stricken. The [state] shall then grant [appellants] the fair hearing that would be available to any private employee, since it will no longer be constrained by any adverse Federal finding." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 439 (D.C. Cir. 1970).

CONCLUSION

For the reasons stated herein the judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. §8506(a), as interpreted by the appellees, to be unconstitutional.

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CHRISTIAN ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72-5704. Argued November 13, 1973—Decided January 21, 1974

Appellants, former federal probationary employees who were denied benefits under the Unemployment Compensation for Federal Employees Program, brought this action in District Court seeking declaratory and injunctive relief against provisions of the Program and its implementing regulations that they contended operated to deny them a hearing on the factual basis for their removal from federal service, for the purpose of determining their eligibility under state law for unemployment compensation. They claimed that the Act requires such a hearing and, alternatively, that the denial of a hearing deprived them of due process and equal protection. A three-judge District Court held that the statute does not require a hearing to contest the employing agency's findings; dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction; and held that the state agency's denial of a hearing did not violate the Due Process or Equal Protection Clauses. *Held:* Any decision upon appellants' statutory or constitutional claims would be premature in view of the fact that the record does not disclose that the state agency, in notifying appellants of the adverse determinations, informed them, as it was required to do by the applicable regulation, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies; or that appellants invoked the available procedure entitling them to request their agencies "to reconsider and correct" those findings. The District Court's dismissal of the suit as to both federal and state defendants is therefore vacated with directions that the court determine whether appellants should be permitted to invoke the applicable administrative procedures. Pp. 618–624.

347 F. Supp. 1158, vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

E. Richard Larson argued the cause for appellants. With him on the briefs were *Dennis R. Yeager* and *Robert P. Roberts.*

Mark L. Evans argued the cause for appellees. On the brief for the federal appellees were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Keith A. Jones,* and *Kathryn H. Baldwin. Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, filed a brief for appellees New York State Department of Labor et al.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants, discharged federal probationary employees, were denied unemployment compensation by the New York State Department of Labor, an "agent of the United States" under agreement with the Secretary of Labor for the administration of the Unemployment Compensation for Federal Employees (UCFE) Program, 5 U. S. C. § 8501 *et seq.* Appellants brought this class suit against that state agency in the District Court for the Southern District of New York, joining as defendants the United States Department of Labor, which is charged with overall responsibility for the program, and the United States Post Office Department and Department of the Treasury, which are appellants' former employing agencies.

Appellants alleged that the state agency had based its adverse determinations on findings of fact made *ex parte* by the federal employing agencies, and that the state agency had refused to afford either appellant a hear-

**Mozart G. Ratner, George B. Driesen, Leo M. Pellerzi,* and *George Kaufmann* filed a brief for the National Association of Letter Carriers AFL–CIO et al. as *amici curiae* urging reversal.

ing at which he could attempt to contest those federal findings. The result, appellants claimed, was a deprivation of any opportunity to be heard, in violation of the UCFE statutes and of the Fifth and Fourteenth Amendments. They sought certification as representatives of the class of persons similarly situated, the convening of a three-judge court, and declaratory, injunctive, and mandamus relief.

The District Court viewed the suit as a constitutional attack on 5 U. S. C. § 8506 (a),[1] which, *inter alia*, makes the findings of the federal employing agency "final and conclusive" on the state agency, and on the regulations of the Secretary of Labor promulgated, pursuant to 5 U. S. C. § 8508, to enforce the program.[2] A three-judge

[1] That subsection provides:

"(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

"(1) whether or not the Federal employee has performed Federal service;

"(2) the periods of Federal service;

"(3) the amount of Federal wages; and

"(4) the reasons for termination of Federal service.

"The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502 (d) and 8503 (c) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter."

[2] The pertinent sections of 20 CFR appear in the Appendix attached to this opinion.

court was convened. That court, in an opinion reported at 347 F. Supp. 1158 (1972), first examined the statutory claim and held that § 8506 (a) does not require that appellants receive either a state or a federal hearing to contest the employing agency's findings. Next, the court noted that jurisdiction over the claims against the federal defendants had been alleged only under 28 U. S. C. § 1361, providing for mandamus actions. Holding that § 1361 will not support a constitutional challenge to a statute, the court dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction.[3] Finally, turning to the constitutional claims against the state defendants, the court, apparently assuming for purposes of argument that the federal defendants were not constitutionally required to afford appellants a hearing, treated the claims as asserting that

[3] The District Court stated no reasons to support this holding. Appellants attack it, arguing that mandamus jurisdiction lies where the act of a federal official, although authorized by statute, is alleged to violate the Constitution, citing *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). Alternatively, they contend that jurisdiction over the federal defendants lies under 28 U. S. C. § 1343 (3) so long as there has been joint participation by state and federal officers under color of state law, see *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). At oral argument the Assistant to the Solicitor General stated: "[W]e do not contest jurisdiction under [the] mandamus statute." Tr. of Oral Arg. 26. See also Brief for Federal Appellee 6 n. 2.

We have no occasion to address appellants' contentions that the District Court has jurisdiction to hear the constitutional claims against the federal defendants. There is jurisdiction of the federal defendants in any event for purposes of consideration of the appellants' statutory claim that the Secretary has disobeyed a nondiscretionary command in § 8506 that he provide for a full hearing. See *infra*, at 621–622. Our remand directs that the District Court reconsider that claim as related to the availability under the Secretary's regulations of a right of reconsideration and correction of the findings of the employing agencies.

denial of a state hearing was, in effect, a denial of any hearing on the federal findings. The court held that the denial of a hearing by the state agency did not violate either the Due Process or the Equal Protection Clause.

We noted probable jurisdiction of appellants' appeal, 411 U. S. 930 (1973). We are of the view that decision upon appellants' statutory and constitutional claims would be premature. We cannot discover in the record that the state agency, in notifying appellants of the adverse determinations, informed them, as required by 20 CFR § 609.20, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies. Nor can we discover from the record whether or not appellants invoked 20 CFR § 609.23, entitling them to request their employing agencies "to reconsider and correct" those findings.

The "findings" of appellant Christian's federal employer, the United States Post Office Department, were that Christian was discharged because of excessive absences. The "findings" of appellant Green's employer, the Department of the Treasury, were that Green was discharged for consuming an alcoholic beverage within 24 hours of going on duty as a sky marshal. It is clear that neither was afforded a prior hearing by his agency or any opportunity to challenge the justifications for his discharge.[4] Each then applied for unemployment compensation through the New York State Department of Labor. As required by § 8506, New York requested and obtained

[4] Appellant Green unsuccessfully sought review of the factual basis for his discharge by the Civil Service Commission under 5 CFR § 315.806. But, as provided by that regulation, a probationary federal employee has no right to appeal a discharge, and is only entitled to a hearing on the basis of claims that the discharge resulted from discrimination based on race, color, religion, sex, political persuasion, marital status, or physical handicap, or that the procedure used violated 5 CFR § 315.805.

from each agency its "findings" describing the nature of the employment, including the reasons for the discharge. On the basis of those findings, the state officials made an initial determination that neither appellant qualified for compensation under the applicable state standards.[5]

We find nothing whatever in the record to show compliance by the state agency with 20 CFR § 609.20. All that appears is that the New York officials sent each appellant a letter that included (a) a recitation that no employment benefits could be paid, (b) the state rule that required that conclusion, (c) a short summary of the findings of the federal agency, and (d) a statement that the individual could request a hearing before an impartial state referee. Indeed, the letter appears to be a form letter appropriate in cases of private and state employee applicants, but not tailored for the situation of the federal employee applicant given rights of reconsideration and correction by the Secretary's regulations.

Appellant Christian requested and obtained a hearing

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[5] Section 8502, 5 U. S. C., provides in part:

"(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8504 of this title to the State had been included as employment and wages under that State law.

. . . . .

"(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

See 20 CFR § 609.14; N. Y. Labor Law § 500 *et seq.* (1965). Both appellants were denied compensation on the basis of § 593, which includes as grounds for denial "voluntary separation without good cause" and "misconduct in connection with his employment."

before a state referee. The referee permitted her to introduce evidence to rebut the federal findings, credited that evidence, and recommended that she be provided unemployment compensation. The state Appeals Board, however, reversed on the ground that § 8506 prohibited re-examination of the facts found by the federal agency. Appellant Green had not obtained a hearing at the time this suit was filed, and the record does not disclose whether he requested one.[6]

The UCFE Program does not, as the state Appeals Board recognized, contemplate a hearing before the state agency for correction of factual findings of the federal employer. But, while prohibiting state re-examination of the facts, § 8506 (a) also requires an opportunity for federal re-examination:

> "The regulations [promulgated by the Secretary of Labor] shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of [state adjudication]."

The regulations promulgated by the Secretary of Labor plainly attach great significance to the right of the discharged employee to have the employing agency reconsider its stated reasons for his discharge. The crucial requirement that triggers this reconsideration is the obligation imposed upon the state agency to notify the applicant of the content of the federal findings, which notice "shall [also] inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings." 20 CFR § 609.20. Thereupon, the employee may obtain additional information from the employing agency concerning the basis

[6] Both appellants were entitled to a hearing, N. Y. Labor Law § 620, review by the Appeals Board, *id.*, § 621, and state judicial review on questions of law, *id.*, § 624.

of its findings, 20 CFR § 609.22. Whether or not he avails himself of that opportunity, he may file a request for reconsideration and correction, "together with such information as supports his request, through the State agency before which the claim is pending . . . ." 20 CFR § 609.23. Upon receipt of such a request, the federal agency must consider any information submitted by the employee, promptly correct any errors or omissions, and either affirm, modify, or reverse its original findings in writing. 20 CFR § 609.9. Finally, the State is required to stay its adjudicatory process pending federal reconsideration, although it is conclusively bound by any factual findings of the federal agency, 20 CFR §§ 609.23 (a), 609.18 (c), when it applies its own law to redetermine eligibility. 20 CFR §§ 609.24 (c), (d).

Appellants' contention that § 8506 (a) works a denial of due process and equal protection by depriving them of a hearing before the state agency is thus misdirected. Congress has precluded a hearing on the federal findings in any state forum, but it has required the Secretary of Labor to provide a "hearing" of some dimensions in conjunction with the mandated procedures for reconsideration. Whether a more comprehensive hearing than §§ 609.22–609.24 of the regulations now provide is required either by the language of § 8506 (a) or by the Constitution—and we intimate no views on those questions—the regulations of the Department of Labor, as implemented by the federal agencies subject to those regulations, should be the focal point of the inquiry.[7]

[7] We note that an employee who resigns must, pursuant to 20 CFR § 609.18, be "afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation," if the federal findings are to be final and conclusive. The Solicitor General argues that there are sound reasons for limiting such opportunities to resignees since the agency "will have no information

The absence of any indication in the record that this federal administrative procedure was followed is, in our view, a bar to our consideration of appellants' attack upon the validity of the regulations. It is true that the fact that the employing agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination. See *Cole* v. *Young*, 351 U. S. 536 (1956); L. Jaffe, Judicial Control of Administrative Action 371–372 (1965). But there are sound practical reasons for declining such review where the agency has not had the opportunity to apply its challenged procedure to a determination that is clearly within its subject-matter jurisdiction.

The most obvious reasons relate to economy. A favorable agency decision on the merits of the claim may moot the objections to the procedure employed. And "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages," *McKart* v. *United States*, 395 U. S. 185, 194 (1969).

But there are also persuasive reasons more directly related to the presentation of the procedural claim, as we have noted in cases involving the analogous requirement that administrative remedies be exhausted prior to application for judicial review of the merits. See *McGee* v. *United States*, 402 U. S. 479 (1971); *Rosado* v. *Wyman*, 397 U. S. 397, 406–407 (1970). Appellants' criticism, on this appeal, of the federal administrative remedy as an *"ex parte"* determination amply demonstrates the point. The regulations clearly require that the agency

concerning [their] reasons." Brief for Federal Appellees 28. At this stage of the litigation, however, we have no way of knowing what protections this procedure includes, how it differs from the procedures available to discharged employees, or what kinds of "resignations" it will cover.

receive and consider any additional information the employee submits. Thus, the question is not whether there is to be some form of adversary proceeding, but whether that proceeding must be as elaborate as appellants contend.[8] That determination would be hazardous on the scant record before us. The regulations appear capable of accommodating various kinds of issues, and their requirements should be construed with an eye to the nature of the agencies involved and the employment relationship. We cannot know at this stage what particular procedures will be applied, whether credibility determinations will arise, how they will be treated if they do, or even what official within a federal employing agency will be responsible for the reconsideration. Removal of these uncertainties from the case may significantly advance judicial resolution of appellants' claims, while occasioning no great cost to them.[9]

But we cannot determine on this record whether the District Court would have dismissed this suit for failure to invoke the federal administrative procedures. The adverse notification provided by New York clearly fails to satisfy the notice requirement of 20 CFR § 609.20 of the Secretary's regulations. Without that crucial information concerning their rights, appellants could hardly be found to have waived them by proceeding in the state forum.[10] Yet the record is silent concerning whether

[8] "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

See *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971).

[9] Cf. *McKart* v. *United States*, 395 U. S. 185, 196–197 (1969).

[10] At oral argument the Assistant to the Solicitor General suggested that appellants might now be barred from obtaining reconsideration

such information was provided, either with the state notice or otherwise. Under the circumstances, we vacate the District Court's dismissal of the suit as to both federal and state defendants and remand to the District Court with directions to determine whether appellants should be permitted to invoke the federal procedures. In such case, the suit should be retained on the docket for final decision following the federal redetermination proceedings.

So ordered.

APPENDIX TO OPINION OF THE COURT

Code of Federal Regulations
Title 20: Employees' Benefits
Part 609—Unemployment Compensation for Federal Civilian Employees

§ 609.1 Definitions.

. . . . . .

(b) "Federal agency" means any department, agency, or governmental body of the United States, including

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and correction of the findings by the passage of time. We find no such limitation in the regulations. Indeed, the only time limitation imposed with regard to corrections is to be found in 20 CFR § 609.7, which requires the federal employing agency to "promptly correct its error" if it ascertains within one year of its initial submission of findings to the State that "any of its Federal findings were erroneous." That this is an independent obligation, imposed on the agency without regard to the receipt of a request for reconsideration by the employee, is clear both from the language of the regulation and from the fact that all other time limits imposed by the regulations are designed to protect the employee from delay by the agency. See, *e. g.*, 20 CFR §§ 609.6, 609.19 (b). Compare *id.*, § 609.24 (a), with *id.*, § 609.24 (d). Moreover, a construction of the regulation as barring reconsideration and correction despite the State's failure to provide the notice required by the regulations might raise independent constitutional problems.

any instrumentality wholly or partially owned by the United States, employing individuals in Federal civilian service.

. . . . .

(f) "Federal findings" means the facts found by a Federal agency as to (1) whether an individual has performed Federal civilian service for such agency during the base period specified on a Form ES–931; (2) the period or periods of such Federal civilian service; (3) the individual's Federal civilian wages for the base period specified on such form; and (4) the reasons for termination of his Federal civilian service.

. . . . .

§ 609.6 Federal findings on Form ES–931.

(a) Within 4 work days after receipt from a State agency or the Secretary of a Form ES–931 a Federal agency shall make its Federal findings, complete all copies of the form, and transmit its Federal findings to the State agency or the Secretary, as appropriate, on such form or as a part thereof. If documents necessary for completion of a Form ES–931 have been assigned to an agency records center or the Federal Records Center in St. Louis the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such request.

(b) If a completed Form ES–931 cannot be returned within 4 work days of receipt the Federal agency immediately shall inform the State agency or the Secretary, as appropriate, and shall include an estimated date by which the completed form will be returned.

(c) Each Federal agency shall maintain a control of the Forms ES–931 received by it that will enable it to ascertain at any time the number of such forms that have not been returned to the requesting State agency

or the Secretary and the date of the Federal agency's receipt of such unreturned forms.

§ 609.7 Corrected Federal findings.

If a Federal agency ascertains at any time within 1 year after it has returned a completed Form ES–981 [*sic*] to a State agency or the Secretary that any of its Federal findings were erroneous it shall promptly correct its error and forward corrected Federal findings to the State agency or the Secretary, as appropriate.

§ 609.8 Answering requests for additional information.

On receipt of a request for additional information under § 609.22 a Federal agency except where it would be inconsistent with general policies followed in the case of separations for security reasons shall furnish in writing to the requesting authority such additional information as (1) will enable a Federal civilian employee to understand the basis for Federal findings or (2) will enable the requesting authority to correctly apply a State unemployment compensation law.

§ 609.9 Answering requests for correction of Federal findings.

On receipt of a request for reconsideration and correction of Federal findings under § 609.23 a Federal agency shall consider the information supplied in connection with such request and shall review its Federal findings. The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing. The Federal agency then shall forward its reconsidered Federal findings to the requesting authority.

. . . . .

§ 609.18 Finality of Federal findings.

(a) Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U. S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23.

(b) Additional information submitted by a Federal agency under § 609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under § 609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§ 609.19 Determination of entitlement.

(a) *Entitlement.* The State agency of a State whose unemployment compensation law applies to a Federal civilian employee under § 609.15 promptly shall determine such employee's entitlement to compensation and pay such compensation in the same amounts, on the same terms, and subject to the same conditions as would apply to such employee if his Federal civilian service and wages had been included as employment and wages under the State unemployment compensation law except that § 609.31 shall apply to the Virgin Islands agency in lieu of this paragraph.

(b) *Determination in absence of Form ES–931.* (1) If a Form ES–931 has not been received from a Federal agency by the 12th day after such form was forwarded to such agency, a State agency shall determine entitlement to compensation on the basis of a Federal civilian employee's statement under oath if in addition to furnishing such statement such employee submits for examination any document issued by a Federal agency (as for example Standard Form 50 or W–2) showing that he performed service for such agency.

(2) If a Form ES–931 received from a Federal agency after such determination contains Federal findings which would result in a change in the Federal civilian employee's entitlement to compensation the State agency promptly shall make a redetermination and give such employee notice thereof. All payments of compensation made after such redetermination shall be in accordance therewith and all payments of compensation made prior to such determination shall be adjusted in accordance therewith. If the Federal civilian employee has received compensation not in accordance with the redetermination § 609.21 shall apply.

§ 609.20 Notice of determination.

A notice of determination or redetermination shall be given to a Federal civilian employee with respect to any determination or redetermination under § 609.19 or § 609.31. Such notice shall be given in the same manner as notice of determination or redetermination is given to claimants under the State unemployment compensation law. The notice shall include the Federal findings and shall inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings. The State agency shall set forth the Federal findings in

sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings.

. . . . . .

§ 609.22 Procedure for obtaining additional information.

(a) *Request by Federal civilian employee.* If a Federal civilian employee needs additional information in order to understand the basis for a Federal finding in connection with a claim for compensation under the UCFE program he may file a request through the State agency, or the Secretary if the State agency does not determine claims under the UCFE program, for more specific information from the Federal agency which made such Federal finding. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for additional information is filed, such employee must file concurrently with such request a timely appeal or request for redetermination under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency the additional information requested.

(b) *Request by State agency.* If at any stage of determining a Federal civilian employee's entitlement to compensation a State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary determines that Federal findings do not contain sufficient information to enable correct application of the State unemployment compensation law a request may be made for additional facts from the appropriate Federal agency.

§ 609.23 Procedure for obtaining correction of Federal findings.

(a) *Request by Federal civilian employee.* A Federal civilian employee who wishes a Federal agency to reconsider and correct Federal findings in connection with a claim for compensation under the UCFE program may file a request for such reconsideration and correction, together with such information as supports his request, through the State agency before which the claim is pending or through the Secretary if the State agency does not determine claims under the UCFE program. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for reconsideration and correction of Federal findings is filed, such employee must file concurrently with such request a timely appeal under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency its reconsidered Federal findings.

(b) *Request by State agency.* A State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary may request a Federal agency to reconsider and correct its Federal findings at any stage in determining a Federal civilian employee's entitlement to compensation.

§ 609.24 Procedure after correction of Federal findings.

(a) A State agency shall forward to the affected Federal civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State un-

employment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal findings submitted by a Federal agency does not consider that there is a basis for making a redetermination the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

. . . . .